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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 427

A/S J. LUDWIG MOWINCKELS REDERI,
Petitioner,

against

MANUAL AMADOR,
Respondent-Libelant,

and against

COMMERCIAL STEVEDORING CO., INC.,
Respondent-Respondent Impleaded.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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FRANCIS X. BYRN,
On the Petition.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner A/S J. Ludwig Mowinckels Rederi prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case on July 1, 1955.

Opinions of the Courts Below

By Findings of Fact and Conclusions of Law dated April 19, 1954 the Honorable John W. Clancy of the United States District Court, Southern District of New York, dismissed both the libel in admiralty of respondent-libelant Manual Amador against petitioner A/S J. Ludwig Mowinckels Rederi, hereinafter called Mowinckels, and the impleading petition of the latter against respondent-respondent impleaded Commercial Stevedoring Co., Inc., hereinafter called Commerical. This decision was not officially reported, but was unofficially reported at 1954 American Maritime Cases 958 and is reprinted at page 1a of the Appendix to this petition. On respondent-libelant's appeal the Court of Appeals for the Second Circuit reversed the dismissal of the libel and remanded the case to the District Court to assess respondent-libelant's damages and for retrial of the action over by petitioner against respondent-respondent impleaded in accordance with the opinion.

The opinion of the Court of Appeals has as of the date of this printing not been published officially but has been published unofficially in 1955 A.M.C. 1448 and is also reprinted at page 6a of the Appendix to this petition.

Jurisdiction

Judgment was entered in the Court of Appeals for the Second Circuit on July 1, 1955 (p. 14a, Appendix).

Jurisdiction to review the judgment by writ of certiorari is found in 28 U.S.C. section 1254(1) and 2101(c) as well as in Rule 19(b) of the rules of this Court under this Court's power of supervision over the Federal Judicial System, and more particularly on the grounds that the Court of Appeals for the Second Circuit has rendered a decision in conflict with the decisions of this Court and of other Courts of Appeals.

Questions Presented for Review

1. Whether findings of fact of a District Court supported by substantial evidence may be overruled by a Court of Appeals without any holding that they are clearly erroneous.

2. Whether a shipowner may be held liable where an accident results solely from the gross negligence of stevedores engaged in discharging the vessel.

3. Whether this decision of the Court of Appeals may be summarily reversed as in conflict with the decision of this Court in *McAllister* v. *United States,* 348 U. S. 19.

Statement of the Case

In March 1951 the m/s Ronda owned by petitioner took aboard at Antwerp, Belgium, a shipment of steel strips consigned to New York, which were stowed in the aft end of No. 4 lower hold on either side of the vessel's shaft tunnel, and which extended forward partially under the square or opening in the hatch above. Later at Le Havre, France, a shipment of wire in coils consigned to Baltimore was received and stowed in the same hold under the square of the hatch opening just forward of the steel. On arrival at New York, the first port of call, the respondent-respondent impleaded Commercial proceeded to discharge the New York cargo. Commercial removed the steel from under the aft end of No. 4 hatch. Commercial employees permitted some drafts or bundles of steel to swing and collide with the wire, which at first remained in place. Finally a number of coils of wire were displaced by this practice and fell on respondent-libelant, an employee of Commercial, causing his injuries. No guide lines or stays were used to check the swinging motion of the steel, and the trial judge found this

failure constituted "gross negligence" (Finding No. 7, page 4a, Appendix) on the part of respondent-respondent impleaded and was the cause of the accident. The stevedores not only were warned to be careful by the Second Officer of the vessel, who twice saw this happen (opinion Court of Appeals, page 10a, Appendix) but also were authorized by the ship's agent's representative on the morning of the day of the accident to shift the wire coils forward if they thought it necessary (Record, pages 253, 256). The guide lines or stays were stevedores' gear, and not part of the equipment of the vessel.

Respondent-libelant commenced a suit in admiralty against the m/s Ronda and petitioner, its owner, for his injuries. His employer, respondent-respondent impleaded, which could not be sued directly by libelant because of his exclusive remedy against it in compensation under the Longshoremen and Harbor Workers Compensation Act, 33 U.S.C. 901 et seq., was impleaded by petitioner on two theories:

1. Indemnity implied in law on the basis of the employer's sole, primary or active negligence.

2. Express contractual indemnity as set forth in the contract between petitioner and respondent-respondent impleaded.

After a trial in admiralty before the Honorable John W. Clancy, at which 16 of the 17 witnesses testified in person, Findings of Fact and Conclusions of Law were made dismissing the libel and, therefore, the impleading petition. The appeal resulted in the reversal of the dismissal of libelant's action with directions that the action over on the express provisions of indemnity be remanded to the District Court for trial as well as the question of libelant's damages against petitioner. The Court of Appeals did not discuss at all the claim for indemnity based on Commercial's sole, primary or active negligence, possibly await-

ing the result of this Court's decision in *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corporation* (No. 4, October 1955 Term) now pending reargument before this Court. The indemnity features are, therefore, not before this Court on this petition.

Federal jurisdiction herein was obtainable in the first instance because this involved an alleged maritime tort cognizable in admiralty.

Reasons for Granting the Writ

Summary of Argument

Reversal of the decision of the Court of Appeals and reinstatement of the District Court's decision is sought herein because the Court of Appeals in its decision did not hold clearly erroneous the trial judge's resolution of conflicting expert testimony in favor of petitioner to the effect (1) that the m/s Ronda was in fact seaworthy, (2) that the way to remove the New York steel over the wire reels was by use of stays or guide lines and (3) that the shifting of the wire reels, although a possible solution, was not necessary to a safe discharge of the steel.

While not expressly saying so, the opinion of the Court of Appeals by logical necessity can only be in conflict with the lower Court's evaluation of the expert testimony. The Court of Appeals held that the shifting of the wire reels was necessary to a safe discharge of the steel. The lower court, however, held that the stevedores were "grossly negligent" in failing to use stays or guide lines to remove the cargo of steel. The lower Court in so finding agreed completely with petitioner's expert who said it could be done in this manner and disagreed with respondent Amador's expert who said that it could not.

The Court of Appeals, therefore, not only failed to apply the "clearly erroneous" standard to this crucial finding

below but compounded its error by reaching a result as if those findings were clearly erroneous when in fact they were not, for there was substantial evidence to support them. *McAllister* v. *United States,* 348 U. S. 19.

In the error of the Court of Appeals lies the difference between the accident being caused by the sole negligence of the stevedore or by the negligence of the stevedore coupled with unseaworthiness. The legal consequences are that in the first instance, as the lower Court found, there would be no liability on the vessel and in the second, the vessel would assume the full liability subject to any claim over for indemnity.

POINT 1

The findings of the District Court as to the method of discharge to be employed by the stevedores are not clearly erroneous. There was substantial evidence for such findings. The conflicting expert testimony on the point was resolved in petitioner's favor by the District Court.

At the trial petitioner produced expert testimony by Captain Alf S. Lie, a man of vast sea experience as well as experience in the investigation of marine casualties with the United States Coast Guard. Captain Lie in answer to a hypothetical question beginning on page 354 of the Record, page 18a of the Appendix, testified that the cargo of steel strips could be safely discharged if somehow held back, and indicated the need for use of guide lines or stays (page 356 of the Record, page 19a of the Appendix). Beginning on page 355 of the Record, page 19a of the Appendix, Captain Lie testified that if the longshoremen in the hold were to lay hold of the sling and if it were taken gradually along the top of the cargo being worked until it came to a position so that it could be raised in a

plumb position onto the boom head, then the steel could be safely discharged. Captain Lie said the purpose of this procedure was to prevent the cargo from striking any adjacent cargo (Record, page 356, Appendix, page 19a). That the District Judge agreed exactly with Captain Lie's testimony is manifest from the almost identical language of his Finding No. 7 saying that the stevedores were

> "grossly negligent in the failure to use a stay or a guide line during the ascent of the draft at least to a stable position suspended in the hatch opening."

On page 359 of the Record, page 21a of the Appendix, Captain Lie said it was not necessary to remove the cargo of wire reels to facilitate the discharge of steel strips.

In direct opposition to this testimony, libelant-respondent's expert, Commander Sauerbier, at page 370 of the Record, page 26a of the Appendix, said the only way to alleviate the disruption of the stow would be to break down the stow of wire reels and shift them forward. On page 378 of the Record, page 32a of the Appendix, Commander Sauerbier testified that guide lines were not a positive control of the load. On page 379 of the Record, page 32a of the Appendix, he said that guide lines were impractical. On page 384 of the Record, page 35a of the Appendix, he was asked if guide lines could have prevented the striking of the steel against the wire reels and he said, "not as they are normally used." Perforce, this conclusion was the same one reached by the Court of Appeals.

The trial judge found as a fact that the failure to use stays or guide lines constituted gross negligence on the part of the stevedores. If guide lines were not a positive control of the load, if they were impractical and would not have prevented the accident, then the stevedores could not conceivably have been guilty of gross negligence for failure to use them. The findings by the District Judge show beyond question that he accepted the expert testimony of Captain Lie over that of Commander Sauerbier on the

issue as to whether or not the steel strips could be safely discharged without shifting the wire reels. In summary therefore, Captain Lie said shifting was unnecessary if the drafts were held back by stays or guide lines, and Commander Sauerbier said shifting was necessary and guide lines or stays could not have prevented the accident. They could not have been in more disagreement.

This testimony by a man possessing not only the qualifications of a lifetime at sea but also the inquisitive mind of one with years of experience investigating marine casualties with the United States Coast Guard, was indeed substantial evidence in support of the trial judge's finding, which finding was therefore not in fact and moreover not even held by the Court of Appeals to be clearly erroneous.

POINT 2

The decision of the Court of Appeals is necessarily in conflict with that of the District Court as to the method or manner of discharge.

The Court of Appeals said the vessel was only conditionally seaworthy in its stowage. The conditions to make it seaworthy were only two,

1. That the wire reels be removed altogether,
2. That the wire reels be shifted.

Without expressly saying so and even after quoting the language of the trial judge that the stevedores were grossly negligent in failing to use stays or guide lines, the Court of Appeals, necessarily, by its decision and reasoning, held that only if the wire reels were shifted or removed could the steel be safely discharged. Shifting or complete removal was, therefore, made compulsory to safe discharge and, consequently, seaworthiness. Such a holding was a clear rejection of the expert testimony accepted by the

District Judge, but the Court of Appeals made no finding that the trial court's finding was clearly erroneous when he found that the failure of the stevedores to use stays or guide lines constituted gross negligence. The holding of the Court of Appeals is even more than a negative rejection of the findings of the trial court, it is a positive adoption of Commander Sauerbier's testimony that only by shifting the wire could the steel be safely discharged.

POINT 3

The Court of Appeals failed to apply the accepted "clearly erroneous" standard of review to findings below, yet reached a result as though those findings were clearly erroneous when in fact they were not.

By ignoring or rejecting the District Court's findings the Court of Appeals has both failed to apply the proper standard of review or any standard of review but has treated the findings in the District Court as though they were clearly erroneous when they were not. In *McAllister* v. *United States,* 348 U. S. 19, 20, this Court asked two questions of the decision of the Court of Appeals:

1. Did the Court of Appeals apply the correct standard of review?

2. If it did, then was the result reached under that standard correct or in other words were the findings in the District Court in fact clearly erroneous?

In the *McAllister* case, *supra,* this Court answered the first question in the affirmative because the Court of Appeals did apply the "clearly erroneous" test to the District Court findings, but answered the second question in the negative because the Court of Appeals said certain findings were clearly erroneous when in fact they were not because there was "substantial evidence" and "a reasonable inference" to support them.

In the within case the Court of Appeals not only failed to apply any standard of review to findings on the method of discharge but reached a result as though the findings on that point were clearly erroneous when they were not, for as shown, there was "substantial evidence" and a "reasonable inference" for the findings of the District Court. Whereas the error of the Court of Appeals in the *McAllister* case was only in holding the findings to be clearly erroneous when they were not, the error of the Court of Appeals in this case is twofold: (1) Failure to hold important findings clearly erroneous; (2) reaching a result as if they were when they were not. In the *McAllister* case, where the substantial evidence was far more conjectural than here, this Court nevertheless held that the Court of Appeals was in error in reversing the lower Court's decision. No less a result should obtain here.

POINT 4

Under the findings of the District Court, the accident could only have occurred through the sole negligence of stevedores. The vessel is not responsible for an accident resulting from the sole negligence of the stevedores.

If the District Judge's finding based on Captain Lie's testimony had been accepted in the reasoning of the Court of Appeals, then the vessel could not have been said to be only conditionally seaworthy because it was not necessary to shift the cargo of wire reels to discharge the steel safely if the use of stays or guide lines could have accomplished the same result. The stow must, therefore, be deemed unconditionally seaworthy as found by the trial judge who heard the witnesses. The occurrence of the accident can only be premised on whether or not the stevedores would be negligent in their discharging operations.

Based on expert testimony, the District Judge found with respect to the original stowage of the steel and wire, "there is nothing in the decision to so load the cargo and stow it that in any way constitutes negligence, for the owners, operators or agents had no reason to anticipate any danger or any more than ordinary difficulty in its discharge" (Finding No. 7, page 4a, Appendix). The District Court said in Finding No. 6, "the cargo was so stowed in the space of the hold so as to best secure the vessel's stability and to use that space to the advantage of the ship and the cargo shippers." The language of the highest Court in the State of New York in *McFall* v. *Compagnie Maritime Belge,* 304 N. Y. 314, 326 is peculiarly applicable here as to the foresight to be exercised by the shipowner.

> "There has been no showing that the mere act of stowing carbon tetrachloride in the deep tanks had possibilities of danger 'so many and so apparent' that the plaintiff was entitled 'to be protected against the doing of it'."

Seaworthiness has never been equated with perfection. Whether in hull, gear, cargo or personnel, seaworthiness has always been based upon the grounds of reasonableness.

> *Boudin* v. *Lykes Bros. S.S. Co.,* 348 U. S. 336, 339;
> *The Silvia,* 171 U. S. 462, 464;
> *The New York,* 204 Fed. 764, 765;
> *Keen* v. *Overseas Tankship Corp.,* 194 F. (2d) 515, 518;
> *Doucette* v. *Vincent,* 194 F. (2d) 834, 837;
> *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. (2d) 397, 400.

Ordinary difficulty in any shipboard activity is therefore encompassed within the meaning of the word "seaworthiness." Ordinary difficulty is solved by ordinary means such as the use of stays or guide lines indicated by Captain Lie and the District Court. Said equipment was solely the prop-

erty of and in the custody of Commercial. By the stevedoring contract between Mowinckels and Commercial, introduced in evidence as Mowinckels Exhibit I during the trial and particularly by paragraph 4 thereof, all equipment not enumerated in paragraph 3 is to be furnished by the stevedores and more particularly "ropes other than cargo falls." Paragraphs 3 and 4 are reprinted on page ..... of the Appendix. It was undisputed at the trial and on appeal that Dominick Intagliato, the stevedore foreman, had control of such gear (Record, page 265).

While the Court of Appeals in its own opinion indicated by dictum that the shipowner would not be liable if "the longshoremen were merely negligent in discharging a well stowed cargo," unfortunately it did not apply that principle to the facts of this action. The holding of the Court of Appeals taken in conjunction with the District Court's non-clearly erroneous findings renders the shipowner liable for the sole negligence of the stevedores.

However, seaworthiness of a vessel has never been made conditional on the proper performance of the incidents of the work by the stevedores. The corollary to that is that the vessel is not responsible for negligence of the stevedores in the performance of their work. This is not the first time that the Court of Appeals of the Second Circuit has taken this position, for it said in *Berti* v. *Compagnie de Navigation Cyprien Fabre,* 213 F. (2d) 397, that the shipowner is not responsible for the stevedores' negligence in the performance of its work, page 400,

> "• • • We are clear that since control of the details of the work were left to American, Cyprien cannot be held for negligence in the latter's performance."
>
> • • • • • • •
>
> "If plaintiff's injuries resulted solely from the manner in which the work was done under American's supervision, he has no recourse against Cyprien."

The Ninth Circuit has recently held that at its own case of *Petterson and Alaska Steamship Company,* 205 F. (2d) 478, affirmed sub nom *Alaska Steamship Company* v. *Petterson,* 347 U. S. 396, is inapposite to a case where the accident resulted from improper use of ship's gear, saying in *Freitas* v. *Pacific Atlantic Steamship Company,* 218 F. (2d) 562, 564, "Unlike the situation in Petterson the accident in this instance was directly brought about by an improper, if not foolhardy, use of the ship's gear." A fortiori, in this case the accident was brought about by the stevedores' gross negligence in failing to use their own gear.

The attempt of the Court of Appeals to distinguish these two cases in its opinion shows that it failed to accept the trial judge's finding of fact that the accident resulted from the gross negligence of the stevedore for it is clear if it had accepted that finding, then by its own language in this case and in the *Berti* case the District Court would have been affirmed. The error of the Court of Appeals is, therefore, critical, for it meant the difference between holding the shipowner liable for unseaworthiness or exonerating it because the accident was caused by the sole negligence of the stevedores.

In *O'Leary* v. *U. S. Lines Company,* 215 F. (2d) 708, the Court of Appeals for the First Circuit, in assessing the ship's duty to maintain a well lighted place for the longshoremen to work took cognizance both of the contract between the ship and the master stevedore and of the practice generally followed and held that it was the ship's duty only to provide an adequate number of suitable lights and the electric power to operate them. Once this duty was fulfilled, it was the master stevedore's duty to request such lights as he thought were needed and to place them where he thought they were needed. As indicated in the within petition, it was Commercial's duty under the contract to furnish stays or guide lines and the stevedores had control of such gear. The failure of the stevedores to em-

ploy such gear was an incident of the stevedoring operation over which the shipowner retained no control as was said in the *O'Leary* case (supra) at page 713,

> "Lighting the hold was an incident of the stevedoring operation over which the shipowner retained no control, and if there was any breach of the duty to light, the breach was that of the master stevedore, not that of the shipowner."

It was then held that under the circumstances the plaintiff must be content with the remedies under the Longshoremen's Compensation Act, Title 33, U. S. 901 et seq., without obtaining what Mr. Justice Jackson, dissenting in *Pope and Talbot Inc.* v. *Hawn,* 346 U. S. at p. 419, referred to as "a bonus recovery over and above the statutory scale of compensation that Congress has established for injured harbor workers in general."

The findings of the District Court based on substantial evidence show there was a safe method of discharge without the necessity for shifting the wire, and cannot be said to be clearly erroneous and were not, in fact, said to be clearly erroneous by the Court of Appeals. It follows by the applicable law cited that the ship is not responsible for the stevedore's negligence and that a summary reversal of the judgment of the Court of Appeals is indicated.

POINT 5

The judgment appealed from imposing liability without fault is contrary to the principle enunciated by this Court that legislative and judicial policy favors discouraging negligence by making wrongdoers pay damages.

A denial of a writ of certiorari will leave standing a decision holding a shipowner liable for the stevedore's gross negligence. This is of course not the state of the law, but if the case of *Ryan* v. *Pan Atlantic Steamship* (supra),

now pending reargument before this Court, is reversed and it is held that no indemnity is recoverable from a stevedore by a shipowner because of the claimed "exclusiveness" of the remedy of the Longshoremen's Act, then the extremely inequitable result will be reached whereby the shipowner's liability without fault or slight fault will render it solely responsible in damages. The stevedore, the one guilty of gross, primary or active negligence, will not only escape liability in damages but will recover by way of assertion of a lien on the injured longshoreman's recovery (*The Aetna,* 138 F. 2d 37, 41 F. (2d); *Fontana* v. *Grace Line,* 205 F. (2d) 151, cert. den. 346 U. S. 886) all funds paid for compensation and medical expenses, in so far as such funds are less than the recovery by the injured party against the shipowner.

This Court in *Bisso* v. *Inland Waterways Corporation,* 349 U. S. 85, construed a towing contract which purported to exempt from all liability for negligence and held that provision invalid. The same policy considerations set forth therein would appear to disapprove of any rule of law holding a shipowner initially liable for injuries caused by the gross negligence of the stevedore and permit that grossly negligent stevedore to escape all liability even for compensation. As the opinion of this Court stated on page 91 "The two main reasons for the creation and application of the rule (a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships) have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains."

The theory of conditional seaworthiness expressed by the Court of Appeals, based on a rejection of Captain Lie's testimony in favor of Commander Sauerbier's, was neither urged in briefs nor raised in argument before the

Court of Appeals. If this Court will not review the decision of the Court of Appeals, then no review is possible.

To preserve uniformity of standards of review, to afford petitioner with its only opportunity for review of a reversal of a decision in its favor (based on findings not clearly erroneous or held to be), it is respectfully requested that the petition be granted and having been granted, the judgment of the Court of Appeals for the Second Circuit be summarily reversed and the judgment and decree of the District Court be reinstated.

Respectfully submitted,

JAMES M. ESTABROOK,
Counsel for Petitioner.

FRANCIS X. BYRN,
On the Petition.

APPENDIX TO PETITION

Findings of Fact and Conclusions of Law of the District Court.

Opinion

Clancy, D. J.

Findings of Fact

1. In March, 1951, the S. S. Ronda, owned by respondent A/S J. Ludwig Mowinckels Rederi, took aboard at Antwerp in her No. 4 hold a cargo of steel strips. The hold was fifty-six feet long and wide, the hatch opening 32.6 feet long and twenty feet wide and the strips about twenty feet long so that approximately half of their length stowed lay immediately under the hatch coaming. The steel was stowed to a height in excess of eight feet so that it was something over the top on both sides of the 8 foot high shaft tunnel. The hold itself was 22 feet deep and above it, the 'tween-deck was 12 feet.

2. The vessel proceeded to Havre and there put aboard in the No. 4 hold something in excess of two thousand coils of steel wire, each one of which weighed 159 pounds, the width of the wire being 6 inches and of the coil about 3 feet. They were laid on dunnage at the bottom of the hold and married, the first tier resting at an angle on a coil laid flat at the side of the hold with the tier above laid at an angle in the other direction so that each tier helped to secure the members of the tier beneath and that above. This process resulted in what was called a "married" stow. Above each three tiers a layer of dunnage was laid thwartships so that there were three in all, the number of tiers being altogether about twelve. Double dunnage was laid in the wings. When the stow was completed the height of the coils was two or three feet higher than the steel and general cargo was laid on both. The top few feet of the coils was shored by vertical dunnage boards braced against

the steel. General cargo baled and bagged, was in the hold forward of the coils. It was known when the vessel was at Havre that the steel was to be delivered at New York and the wire coils afterwards at Baltimore. While the Ronda encountered generally fair weather on her voyage the sea was sometimes rough and the vessel then pitched and rolled.

3. The Ronda arrived at New York on the 19th of March, 1951 and the next morning a gang of stevedores, employed by the Commercial Stevedoring Company, Inc., the impleaded respondent, went aboard and proceeded to discharge the cargo in the 'tween-deck section of No. 4 hold as well as at least some of the general cargo in the lower hold. When this was completed, the discharge of the strip steel cargo was started and proceeded during the rest of the day. The steel strips were taken out by eight men divided into two gangs of four, one of which operated on the port side and the other on the starboard. A number of the strips, approximating two and one-half tons, were taken out at a time in a sling. The sling was sent aloft on the ship's crane by the gang working on one side while the gang on the other side was preparing the next draft for discharge. The process was to lift the end of the draft under the hatch opening to a point where it was higher than the coil cargo, whereupon the rope attached to the rear end of the draft would be tightened and the whole draft swung to a position under the hatch opening, lifted and put upon the dock. No guide line or backtop was used by either gang.

4. It is found as a fact that from the beginning of the discharge of the steel this method of the stevedores' operation caused frequent collisions between the ends of some of the drafts and the coiled wire. The assistant operating

manager of the ship's agent who also was general superintendent of Commercial Stevedoring Company authorized the boss of the stevedoring gangs working in the No. 4 hold to remove so much of the coil cargo as would at any time appear necessary to facilitate the discharge. It is also found that the ship's second mate in charge of the discharge, on the morning of the 21st of March, noticed some damage to the front of the wire coil stow and complained to the stevedoring boss and authorized him to remove such of the coils as he thought necessary. None of it was removed by the stevedores who persisted in maintaining the practice we have stated.

5. In the early afternoon of March 21, libellant, who was a member of the stevedore gang operating in No. 4 hold, while engaged in passing a loop of rope under what was intended to be a draft of the steel strips and while his back was turned to the coil cargo, was struck by one or several of some dozen coils which were dislodged and fell from the top two tiers of the stow. He was severely injured. The dislodgment of the coils was caused by successive collisions between the ends of the drafts of steel strips as the drafts were lifted and immediately by such a collision effected by the port gang whose draft was then being carelessly removed while libellant was preparing the draft to follow.

6. The manner of stowing the coils was usual, practical, safe and wholly satisfactory. The stow had survived the rough seas of a winter passage without difficulty and was in the same condition when the steel strips were being discharged as it was when it was stowed. The cargo was so stowed in the space of the hold as to best secure the vessel's stability and to use that space to the advantage of the ship and the cargo shippers. The manner of stow and the

nature of the cargo made the erection of a bulkhead of partition in the hold unnecessary and even inadvisable. There is no credible evidence in the case that the coils were ever disturbed other than by the collisions with the drafts of steel as the stevedores worked. The vessel was at all times seaworthy in respect to its stow in No. 4 hold.

7. As has already been stated it was known when the coiled cargo was put aboard that the discharge of the steel strips would precede the discharge of the coils. There is nothing in the decision to so load the cargo and stow it
11 that in any way constitutes negligence, for the owner's operators or agents had no reason to anticipate any danger or any more than ordinary difficulty in its discharge. The hold with its cargo stowed and as it was turned over to the stevedore, was a safe place for their work. The superintendence and direction of the stevedores' work was entirely that of the respondent stevedoring company which employed the men, including the libellant. The stevedoring boss who had been given authority to act in the circumstances by the two persons who could authorize him declined or failed to take advantage of his authority. The stevedores' work was grossly negligent in the failure to use a stay or guide line during the ascent of the draft at least to a stable position suspended in the hatch opening. They were negligent as well in their general conduct in
12 so conducting the discharge operation as to cause repeated collisions between the drafts of steel strips and the coils. So gross was their negligence that not even the repeated collisions served as warnings to take measures to avoid dislodging the stow of coils. The dunnage as it was laid served its purpose. The stow was solid and remained solid until discharged and the manner of laying the dunnage had nothing whatever to do with plaintiff's injury.

Findings of Fact and Conclusions of Law of the District Court. 13

CONCLUSIONS OF LAW

1. The libel is dismissed with costs and the impleading petition is dismissed with costs.

The findings answer all plaintiff's contentions except his proposal that the mate should have stopped the work in the hold when he noticed the manner of discharge had damaged the coils. Stopping the work would be an extreme recourse for the ship. The mate's job was to have her cargo discharged. The precise damage to the coils or its extent is not given. The stevedores were employed to discharge the hold and would be the proper persons to do the work and 14
the ones under a contract obligation to do it. When the mate gave them authority to remove the coils and protested against the manner of conducting the work he did all that could be required of him in the circumstances shown by the evidence. There is a failure of proof of other circumstances that would indicate the reasonableness of an order to discontinue operations.

Dated: New York, N. Y., April 19, 1954.

JOHN W. CLANCY,
United States District Judge.

15

16

Opinion.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 313—October Term, 1954

Argued May 11, 1955 Decided July 1, 1955

Docket No. 23323

[SAME TITLE.]

17 Before:

HAND, SWAN and FRANK,
Circuit Judges.

On appeal by the libellant from a decree in the admiralty of the District Court for the Southern District of New York (Clancy, J., presiding), dismissing his libel against a shipowner for injuries caused by the ship's unseaworthiness.

ROBERT KLONSKY for the appellant.
JAMES M. ESTABROOK for the appellee.
ALBERT P. THILL, for Commercial Stevedoring Co., Inc., impleaded.

18 HAND, *Circuit Judge.*

This is an appeal from a decree in the admiralty of Judge Clancy, dismissing a libel in rem and in personam against a motor vessel and its owner, to recover for personal injuries suffered by a longshoreman during the discharge of the vessel in New York. The owner impleaded the stevedoring company which had employed the libellant, basing

its claim upon an indemnity contract; but since the libellant's libel was dismissed, it was unnecessary for Judge Clancy to pass upon that claim. The libellant was a member of a stevedore gang working in a lower hold of the vessel, when a heavy coil of wire was dislodged through the carelessness of other members of the gang and fell upon him, causing him severe injuries. The libel is based upon the theory that the cargo was so stowed as to make the ship unseaworthy, and that she and her owner were liable regardless of the negligence of the stevedoring gang.

The first five findings, which we quote, eliminating one erroneous statement, state in detail what happened, and they are not clearly erroneous. 20

"1. In March, 1951, the S.S. RONDA, owned by respondent A/S J. LUDWIG MOWINCKELS REDERI, took aboard at Antwerp in her No. 4 hold a cargo of steel strips. The hold was fifty-six feet long and wide, the hatch opening 32.6 feet long and twenty feet wide and the strips about twenty feet long so that approximately half of their length stowed lay immediately under the hatch coaming. The steel was stowed to a height in excess of eight feet so that it was something over the top on both sides of the 8 foot high shaft tunnel. The hold itself was 22 feet deep and above it, the tween-deck was 12 feet.

2. The vessel proceeded to Havre and there put aboard in the No. 4 hold something in excess of two thousand coils of steel wire, each one of which weighed 159 pounds, the width of the wire being 6 inches and of the coil about 3 feet. They were laid on dunnage at the bottom of the hold and married, the first tier resting at an angle on a coil laid flat at the side of the hold with the tier above laid at an angle in the other direction so that each tier helped to secure the members of 21

the tier beneath and that above. This process resulted in what was called a 'married' stow. Above each three tiers a layer of dunnage was laid thwartships so that there were three in all, the number of tiers being altogether about twelve. Double dunnage was laid in the wings. When the stow was completed the height of the coils was two or three feet higher than the steel and general cargo was laid on both. The top few feet of the coils was shored by vertical dunnage boards braced against the steel. General cargo, bailed and bagged, was in the hold forward of the coils. It was known when the vessel was at Havre
23 that the steel was to be delivered at New York and the wire coils afterwards at Baltimore. While the Ronda encountered generally fair weather on her voyage the sea was sometimes rough and the vessel then pitched and rolled.

3. The Ronda arrived at New York on the 19th of March, 1951 and the next morning a gang of stevedores, employed by the Commercial Stevedoring Company, Inc., the impleaded respondent, went aboard and proceeded to discharge the cargo in the tween-deck section of No. 4 hold as well as at least some of the general cargo in the lower hold. When this was completed, the discharge of the strip steel cargo was started and proceeded during the rest of that day.
24 The steel strips were taken out by eight men divided into two gangs of four, one of which operated on the port side and the other on the starboard. A number of the strips, approximating two and one-half tons, were taken out at a time in a sling. The sling was sent aloft on the ship's crane by the gang working on one side while the gang on the other side was preparing the next draft for discharge. The process was to lift the end of the draft under the hatch opening to a point

where it was higher than the coil cargo, whereupon the rope attached to the rear end of the draft would be tightened and the whole draft swung to a position under the hatch opening, lifted and put upon the dock. No guide line or backstop was used by either gang.

4. It is found as a fact that from the beginning of the discharge of the steel this method of the stevedores' operation caused frequent collisions between the ends of some of the drafts and the coiled wire. The assistant operating manager of the ship's agent who also was general superintendent of Commercial Stevedoring Company authorized the boss of the stevedoring gangs working in the No. 4 hold to remove so much of 26
the coil cargo as would at any time appear necessary to facilitate the discharge. * * * None of it was removed by the stevedores who persisted in maintaining the practice we have stated.

5. In the early afternoon of March 21, libellant, who was a member of the stevedore gang operating in No. 4 hold, while engaged in passing a loop of rope under what was intended to be a draft of the steel strips and while his back was turned to the coil cargo, was struck by one or several of some dozen coils which were dislodged and fell from the top two tiers of the stow. He was severely injured. The dislodgment of the coils was caused by successive collisions between the ends of the drafts of steel strips as the drafts were lifted 27
and immediately by such a collision effected by the port gang whose draft was then being carelessly removed while libellant was preparing the draft to follow."

Bentsen was the assistant general superintendent of the ship's agent in New York, and he did not examine the stow with much care. It does not appear whether what he told

the gang bosses was before they had begun to discharge the steel strips in the way they did; but, although he did not warn them before he left, Lunde, the ship's second mate, saw the drafts hitting the coils and warned the gang bosses to be careful. Moreover, later, after he came back and saw the same thing happening, he again warned them and they agreed to be careful. The judge held that the stowage was proper; that there was no credible evidence that the coils had been disturbed except by being upset, when the drafts struck them. He held that "the stevedores' work was grossly negligent in the failure to use a stay or guide line during the ascent of the draft at least
29 to a stable position suspended in the hatch opening. They were negligent as well in their general conduct in so conducting the discharge operation as to cause repeated collisions between the drafts of steel strips and the coils. So gross was their negligence that not even the repeated collisions served as warnings to take measures to avoid dislodging the stow of coils. The dunnage as it was laid served its purpose. The stow was solid and remained solid until discharged and the manner of laying the dunnage had nothing whatever to do with plaintiff's injury."

We do not understand that the appellee denies that a ship is responsible for proper stowage, as well as for fitness in hull and gear; at any rate that is certainly the law. In the case at bar, considering the position of the strips and
30 the port to which they were consigned, they were properly stowed, only in case the coils were moved out from under the square of the hatch before the strips were themselves discharged; or, if that was impracticable, if the coils were actually discharged at New York, and then reladed after the strips had been discharged. In short, the stowage was improper, should the strips be discharged over the tops of the coils, the pile of which inevitably got higher and higher above the strips as the strips were progressively dis-

charged. So discharged as in fact they were, the stowage was dangerous, as appears beyond question from the testimony of Lunde, the ship's second mate, who was present while the work was going on, and twice warned the gang bosses that the strips were fouling the coils and that they must be careful.

We read *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85, as definitely laying it down that longshoremen discharging a ship are in the same position vis-a-vis the ship as members of her crew; but the situation is to be distinguished from one in which the longshoremen were merely negligent in discharging a well stowed cargo. They were negligent, it is true; but that was not all. The strips being consigned to 32
an earlier port of discharge than the coils, the way they were discharged was as much a part of the stowage, as is the proximity of perishable cargo to cargo that will injure it. The stowage was therefore only conditionally proper, and we do not see how the ship can escape liability when she allowed a stow, only conditionally proper, to be discharged without the fulfillment of the condition. The consent of Bentsen, the assistant general superintendent of the ship's agent in New York, would indeed have been enough, if the ship's duty ended with engaging a competent stevedoring company to discharge the strips; but it did not stop there. Under *Seas Shipping Co.* v. *Sieracki,* supra, the longshoremen as, pro hac vice members of the crew, were exposed to the dangers of a negligent stow as long as the 33
condition remained unfulfilled. What Lunde did was indeed quite natural in view of the contract between the ship and the longshoremen's contract; but it did not fulfill the condition. Unless we have misunderstood the doctrine, the situation as to the ship's liability is precisely as though the crew had been discharging the strips, and Lunde had not seen to it that the discharge of the strips at the earlier port had not been made in accordance with what its posi-

tion in the stow demanded if its discharge was to be safe. Our decision in *Berti* v. *Compagnie Cyprien,* 213 Fed. (2) 397, is not in point; it decided no more than that in spite of the defects—in that case of gear—the ship was "reasonably" fit for her service, which is the accepted test. The same is true of *Freitas* v. *Pacific-Atlantic S.S. Co.,* 218 Fed. (2) 562 (C. A. 9); incidentally a decision of the same court whose ruling was affirmed in *Petterson* v. *Alaska S.S. Co.,* 347 U. S. 396. The decree must be reversed in the main suit, and the libel remanded for a determination of the damages.

There remains the cross-claim of the ship against the
35 stevedoring company, which, as we have said, Judge Clancy did not dispose of, because it became moot as soon as the libel was dismissed. After the decree was entered, the Supreme Court held that a marine insurance contract is to be construed under the law of the state where it was made, and not in accordance with any general rules of the admiralty, or of the power of Congress to regulate such contracts.* Perhaps the provision in the contract between the ship and the stevedoring company would fall within this ruling; we are not sure, and the question must be considered as not free from doubt. In *American Stevedores, Inc.* v. *Porello,* 153 Fed. (2) 605, we had passed upon a contract of a stevedoring contractor indemnifying the United States in precisely the same words as those of Article Eleven of
36 the contract at bar. We held the stevedore liable, but the Supreme Court reversed (330 U. S. 446, 457), holding that "the clause is ambiguous. Evidence might well have been taken as to the intention but was not. It may be that the parties only meant American to indemnify the United States should the Government be held liable for damages solely caused by American's negligence. It may be that

* *Wilburn Boat Co.* v. *Firemen's Fund,* 348 U. S. 310.

the intention was that American should fully reimburse the United States for all damages caused in any part by American's negligence. Finally, the parties may have intended that American, in the case of the joint negligence of the parties, should be responsible for that proportion of the damages which its fault bore to the total fault." For these reasons it remanded the cause for hearing on testimony: i.e., to ascertain the meaning of the written contract. There seems to be no doubt that in this decision the Court was assuming that such a contract was to be decided under the admiralty law; but that was eight years before the decision in *Wilburn Boat Co.* v. *Firemen's Fund,* supra. If there is no difference in this regard between an indemnity contract like this and a contract of marine insurance, 38 the state law applies, and in that event *Semanchuck* v. *Fifth Avenue,* 290 N. Y. 412, may cover this situation because the loss occurred in part from the ship's neglect to provide fit stowage, and there was no language in the indemnity contract covering losses to which the indemnitee's negligence contributed. We must confess that that issue is far from clear; and, since the District Court has never passed on the cross-claim at all, except to dismiss it as moot, it is certainly desirable, if indeed it is not jurisdictionally necessary, that we should not attempt to dispose of it. It too must therefore be dismissed, though without prejudice, and the cross-claim must be remanded for trial.

Decree reversed; libel and cross-claim remanded for 39 further proceedings in accordance with the foregoing.

40 **Judgment Appealed From.**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of July, one thousand nine hundred and fifty-five.

Present:

HON. LEARNED HAND,
HON. THOMAS W. SWAN,
HON. JEROME N. FRANK,
Circuit Judges.

41

MANUEL AMADOR,
Libellant-Appellant,

v

m/s RONDA, et al.,
Respondent-Appellee,

COMMERCIAL STEVEDORING CO., INC.,
Respondent-Impleaded.

Appeal from the United States District Court for the Southern District of New York.

42 This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed: libel and cross-claim remanded for further proceedings in accordance with the opinion of this court.

A. DANIEL FUSARO,
Clerk.

43

Excerpt From Contract Between A/S J. Ludwig Mowinckels Rederi and Commercial Stevedoring Co., Inc., Dated November 1, 1939.

* * * * * *

3. The General Agent shall, at its own expense, furnish and maintain in good working order all necessary winches, capable of lifting three (3) gross tons in single gear, and shall also furnish at its own expense, the necessary steam or power, blocks, ropes for falls, dunnage and necessary light on wharves and ships, when lights are required due to darkness. In case derricks or cranes are required to handle lifts in excess of three (3) gross tons (hereinafter referred to as "heavy lifts"), they shall be furnished through the General Agent or its authorized agent for the 44
General Agent's account, but derricks or cranes shall not be employed when, in the opinion of the General Agent or its authorized agent, heavy lifts can be satisfactorily handled by rigging ship therefor. The Stevedore will not be allowed any compensation for handling heavy lifts requiring the use of derricks or cranes, except when extra labor is furnished by the Stevedore in connection therewith, in which event the Stevedore shall be paid on the basis provided in paragraph nine (9) hereof.

4. The Stevedore shall, at its own cost and expense, furnish all gear and equipment, except as provided in paragraph three (3) hereof, including slings, hatch-tents, conveyor awnings, pendants, ropes other than cargo falls, 45
hooks, trucks, conveyors and save-alls, necessary for loading and discharging. The Stevedore shall, at its own cost and expense during straight time and/or overtime, handle lines on docking, undocking and shifting the vessel, rig and unrig all gear, rigging and equipment necessary for loading and discharging, including loading and discharging heavy lifts when handled by ship's gear; take off and put on all hatches, strongbacks, hatch beams, hatch boards and tar-

46 *Excerpt from Contract between A/S J. Ludwig Mowinckels. Rederi and Commercial Stevedoring Co., Inc., Dated November 1, 1939.*

paulins; load, discharge, shift and lay all dunnage, except as provided in paragraph nine (9) hereof. The Stevedore shall also furnish and pay all winchmen.

* * * * * *

Excerpts From Transcript of Testimony of the District Court.

* * * * * *

47 [351] ALF S. LIE, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct examination by Mr. Estabrook.

Q. Captain Lie, what is your present occupation? A. Marine consultant.

Q. Do you hold a license in the American Merchant Marine? A. I do.

[352] Q. What license? A. Master, one limited and—and——

Q. How long have you held that license? A. Since 1919, master's license.

Q. Would you state your maritime experience for the record? A. Well, I commenced going to sea in 1905 and,
48 with the exception of maybe a year and a half ashore for schooling in navigation and hull construction, I continued both in the Merchant Marine and the Navy until 1937, when I came ashore and joined the Department of Commerce.

Q. Have you served as a steamboat inspector? A. Yes, until 1942 when I joined the Coast Guard.

Q. What were your duties as an inspector and in the Coast Guard? A. Well, in the Department of Commerce

our duties were to inspect vessels as to seaworthiness and examine candidates for licenses and certificates, and investigated casualties and accidents. That comprises the duties of the inspection service.

Q. Have you now retired from the Coast Guard? A. I retired in 1953—31st of March, 1953.

Q. Captain Lie, you have been present throughout this trial, haven't you? A. I have.

[353] Q. Are you familiar with the use of temporary wooden bulkheads on vessels? A. Yes, quite so.

Q. What is the purpose of such a temporary wooden bulkhead? A. Well, they are strictly used in connection with bulk cargo. 50

Q. What is their purpose? A. Well, it is used for—it can be two purposes, now, to separate cargo as well as act as shifting board in the carrying of grain, if you understand what I mean. It is a wooden structure in the center line of the ship which prevents or, rather, helps in keeping the grain in a quiet position in the ship while at sea.

Q. Are temporary wooden bulkheads used in connection with the carriage of wire? A. Never heard of it or any other general cargo. It would not be practical.

Q. What is your reason for that? A. Well, if you want to construct a proper temporary bulkhead, you would put up a substantial structure, to begin with, and then you would have to shore it and from the very ends or sides of the hold, whichever way it might be constructed.

In other words, you would have to shore a bulkhead. 51
We will say, if you put one up in the middle [354] of a hatch or hold, you would have to shore it, to make it effective, to the structural, permanent structural member of the ship, which would be the nearest bulkhead, in order to make it of any service.

Q. Could you run the bulkhead across from one side of the ship to another without putting shores from the bulk-

head aft or forward? A. No, sir, it would be useless, such as shoring as you might be able to put from between stanchions. You have what we call 'tween deck stanchions in the lower hold. That would be insufficient. In other words, it would not be a bulkhead.

Q. Captain Lie, assume that you have a ship with bundles of steel about 20 feet long, about 18 feet long, weighing about a ton and a half, stowed fore and aft in the after part of a hold;

Assume further that the after edge of the hatch opening is 12 to 13 feet forward of the after bulkhead so that the pieces of steel extend out some eight or nine feet under the
53 hatch;

Assume further that there was a space of about two feet forward of the steel, and then there is a stow of wire coils, which have been described as weighing about 160 pounds, a little less than three feet in diameter and [355] a stow of eight to ten feet high:

Can you state the proper method of discharging the steel, bearing in mind that at the start of the operation the top of the steel is about two feet below the top of the wire; as the steel is discharged you work down?

Can you describe the proper method for discharging that steel? A. I am not a stevedore, but I will state as to what I think should be the proper way of unloading it.

Q. You have observed the discharging of vessels? A. I have handled materials of this kind on many occasions in
54 my time at sea.

Since the slings are of that length—I understand they were 20 feet long, is that correct?

Q. Yes, 18 to 20 feet. A. (Continuing)—and you are restricted forward in your hatchway so that the end of your steel sling would necessarily or, perhaps, would have to come in contact with the steel coils when the wire—the runner, rather, your lifting runner is centered onto the

boom head block, it would be most desirable to either take up on your sling, each sling, or else have the longshoremen, stevedores in the hold lay hold of the sling and the hatch foreman raise it very [356] gradually and slowly so it would drag either on top of your deck, if you were down below, or on the layer of cargo on which you were working until it gets to such a position easily so it can be raised up in a plumb position onto the boom head.

Q. Are backstops or guide lines commonly used for that purpose? A. That would depend on the size of the slings you were handling. As I said before, the slings aren't too heavy, and these were a ton and a half, as I understand it——

56

Q. Yes? A. Proper operation by the hatch foreman and direction as to the winch driver, and the orders to the stevedores below—how many men were below? May I know that?

Q. Eight men below, four men on each side of the tunnel. A. By applying themselves, through holding back this load, and heaving it up very gradually, taking a strain on the higher end of it and let it slide forward, it could easily do without backstops in such operation, but they would have to hold it back somehow.

Q. It would be important not to have it strike the wire? A. Yes, that is the purpose of it, my explanation, not to strike the adjacent cargo or bulkhead or whatever you have.

57

[357] Mr. Estabrook: No further questions.

Cross-examination by Mr. DiCostanzo.

Q. If this shoring, sir, that had been constructed above the steel and holding back the top of the stow, if it had been constructed all the way down to the bottom, would that

58 *Alf S. Lie—For Respondent—Cross.*

have prevented the wire from toppling over? A. You mean the top? As I understand it, the top layers fell down, isn't that correct?

Q. Yes. A. I would say I don't see where that would have any bearing on the top layer.

Q. If you had your shoring all the way up? A. What shoring? You mean shoring all the way down to the floor?

Q. Yes. A. What will be the purpose of that?

Q. Preventing this particular wire from toppling over? A. Wouldn't the weight of this cargo of steel coils hold itself in position below the top layers? That is impossible.

59 The Court: This sounds argumentative to me. The fact of the matter is, I suppose, that you don't need any expert, whether one with technical or classic knowledge, to know that if there was a wall strong enough, it would stop anything from falling over.

[358] The Witness: That is right, sir.

The Court: That is a peculiarly hypothetical question, and I don't know what it has to do with the case.

Q. Have you supervised any discharging of cargo? A. Well, I have been an officer and master of a ship since 1914 or 1913, that is, master of sail since 1913, but not steam. So I have had some experience with cargo.

60 Q. Would you have permitted a longshoreman to remove cargo of steel, such as described here, from the lower hold, making it necessary to take it out from underneath the wings, of the dimensions that have been testified here, and about seven feet below the top of the wire stow, with just a two-foot clearance? A. What position would I be in? Would you place me in a certain position as a ship's officer?

Q. As a ship's officer. A. I don't think I would have anything to do with it.

Q. What? A. I don't think I would have anything to do with it. The stevedores are more qualified to handle cargoes than me, and they are the ones that have contracts to do it, and to tell them how they should do it, I don't believe that I would do it. I think, to say [359] the least, they would resent it, if they wouldn't do anything else. They are supposed to know.

Q. Supposing you were discharging it? Supposing you had your crew discharging the cargo? A. I have done that, too.

Q. Would you consider those circumstances safe? A. I would remove the cargo in front, that is, the cargo in way of the hatch, if it was necessary, naturally. On the other 62
hand, as I explained before, if I may say something in that connection, if I adhere to the method which I described, I don't think there would be any need of removing any cargo, if you are careful.

Q. This particular wire stow would be in the center of the vessel, or, rather, practically in the center of Hatch No. 4, with cargo forward and cargo aft. That becomes one solid mass, doesn't it? A. I would say so, because it is a very good cargo to carry.

Q. What? A. It is a very good cargo, considered a good cargo. It will lie well, and it is also alive. It is not dead weight.

Q. It is alive, isn't it? A. It is alive because it is resilient. It isn't like pigiron, for instance. It is a much better 63
cargo and shifts much [360] less easy, we will say, than pigiron.

Q. Shifts easier than pigiron? A. Shifts less easy. Pigiron is the worst you can carry for shifting.

Q. What do you mean by shift less easy? A. I mean in a sea way.

Q. What do you mean by "less easy"? I don't know what that means. A. I may have expressed myself wrong.

I said it was a good cargo. I mean by that that it will lie well.

The Court: It is resilient and takes up stresses more easily?

The Witness: That is right, and it would adhere better in the position where it is placed, whereas if you carry pigiron, when that starts to shift, you can't stop it.

The Court: We will dismiss pigiron from our consideration.

The Witness: I only mentioned that as a comparison, your Honor.

65 Mr. DiCostanzo: That is all.

Mr. Estabrook: I have no further questions.

(Witness excused.)

Mr. Estabrook: I offer in evidence the stevedoring contract, between the respondent, by its general [361] agents, and the respondent-impleaded. I have already shown it to Mr. Hanan.

(Marked Respondents' Exhibit I in evidence.)

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[364] March 11, 1954,
2:00 o'clock P. M.

TRIAL RESUMED.

66 CHARLES L. SAUERBIER, called as a witness on behalf of the libelant, in rebuttal, being first duly sworn, testified as follows:

Direct examination by Mr. DiCostanzo.

Q. Mr. Sauerbier, by whom are you employed? A. United States Merchant Marine Academy, Kings Point, New York.

Q. In what capacity, sir? A. Chief of the Cargo Section in the Department of Nautical Science.

Q. What are your duties? A. My primary duty is instruction in cargo handling and stowage.

Q. Will you tell us your past naval experience? A. Naval experience?

Q. Your education. A. Merchant Marine and Navy or just——

Q. Yes? A. —or just Navy?

Q. Merchant Marine and Navy. A. Well, I am a graduate of the California Maritime Academy, 1934; and upon leaving the Academy, I went to sea with an oil [365] company, Richfield Oil Company, for about one year. I then 68
went with Matson Navigation Company in 1942.

Q. In what capacity? A. As third mate, second mate, and chief officer. Chief officer. In 1942 I went into the Navy and I was with the Navy until 1946, October, at which time I was separated, and in the City of San Francisco. At that time, instead of going back with Matson Navigation Company, I took a position with the United States Merchant Marine Cadet Corps as an instructor at their school in San Matteo. That school closed in 1947, and I was transferred to my present billet in the Academy at Kings Point, and I have been there ever since 1947.

The Court: What did you do in the Navy?

The Witness: I was—1942 until 1945—I was attached to the United States Merchant Marine Cadet 69
Corps stationed—that is, naval officers were sent there by the Navy; to teach seamanship, navigation and so on, cargo handling and stowage.

And then I was transferred in 1945, December, to Singtao, China, for about eight months, seven or eight months, leaving July 14th. And then I had terminal leave until—July until October. That is when I was separated, October, 1946.

70 *Charles L. Sauerbier—For Libelant in Rebuttal—Direct.*

[366] Q. Have you any rank in your organization? A. In the Navy?

Q. Yes. A. United States Naval Reserve, I hold a rank as Commander.

In the Academy, they give ranks also to the instructors and the chiefs of sections. Lieutenant Commander is the rank I hold—called Lieutenant Commander, United States Maritime Service.

Q. Have you written any papers that you have delivered on cargo handling? A. Yes, I have written three technical papers at the request of the International Cargo Handling Coordination Association. One was delivered in Rotter-
71 dam on education in cargo handling January 25th. The other one was delivered on February 24th in this city on cargo operations—rather, improvements in cargo operations through research. I have also written one for delivery in Naples, International Assembly in Naples, this coming June, on education as pertaining to cargo handling—cargo operations.

Q. Are you in the process of writing a book? A. Yes, sir, I am.

Q. Have you completed it yet? A. Not yet.

Q. What does the book deal with? A. Cargo [367] operations. The title I hope to give it is "Cargo Operations in the Merchant Marine."

Q. Commander, in the course of your experience as a
72 third mate, second mate and first officer, did you have any experience in handling coil wire? A. Yes, some as part cargo of general cargo.

Q. What, in your opinion, is the proper and correct way to stow coiled wire? A. Coils of wire that are not rigid and are somewhat flexible I would lay one tier down and then, because of the lack of rigidity, instead of attempting to stow them brick fashion, I would lay the second tier one-half of a coil to one side all the way across and I would set the third tier in the bight of the second tier. On top

of that, to strike a level, I would lay dunnage. I would lay strip dunnage, ordinary 1 x 6 inch low-grade lumber, spaced perhaps three or four inches; not necessarily, but to save dunnage it would be proper. Then go ahead with another tier in the same fashion. Dunnage would serve to strike a level to bind the cargo together, bind the load together.

Q. Would you lay the dunnage athwartship or fore and aft? A. If I was building a bulkhead, a bulkhead that [368] was running athwartship, I would put the dunnage fore and aft.

Q. Why would you do that? A. As I say, to bind the cargo together, tie it together, so that when you lay the first—when the first tier dunnage goes down and you lay 74
more reels on top of that, the tiers, as you go deeper into the stow, sit also on this dunnage and it ties it together and it is less likely to collapse, the bulkhead you are building. If you put it athwartship, you have a unit in itself here, and you have a unit here, and the first one can tumble away from the other because it is not tied together if the dunnage sort of ran along the bulkhead, rather than at right angles to the bulkhead.

Q. Commander, the M/S Rondo is a vessel 426 feet long and 56 broad, and 4600 gross tons. We are interested particularly in hatch No. 4. Hatch No. 4 is approximately square, approximately 56 x 56 feet. The distance from the lower hold to the 'tween deck is 22 feet. The after end hatch coaming extends out approximately 12 to 13 feet. Now, underneath this extension of 12 to 13 feet, we have 75
a cargo of steel bundles. Forward of the cargo of steel bundles we have a stow of coiled wire. This stow is approximately 10 feet deep, eight feet high and runs [369] athwartship. I want you to also take into consideration the fact that we have a tunnel running through approximately the center of hatch No. 4. I want you to also consider the fact that the coils of wire are stowed approximately two to three feet above the level of the steel and that the steel is practically level with the tunnel.

Knowing all of those factors, would you consider it a safe operation to snake out the cargo of steel from underneath the hatch coaming under such circumstances as you described, there is an eight-foot clearance from the bulkhead of the steel to the hatch coaming. In other words, you have an eight-foot space longitudinally and about an eight-foot space athwartship, so you have a hole 8 x 8 in which to snake out the steel with a bulkhead of wire forward. A. This operation at the beginning, at the very beginning, the first two or three tiers of steel coming out, possibly you might not have any damage, but as soon as you go down the least bit you would commence to have
77 trouble snaking these long lengths, as I see it, out from that small 8 x 8 hole. You would commence to have trouble keeping clear of this bulkhead of wire.

Q. Place the operation, sir, at a lower level, approximately six to seven feet below the top of the wire [370] stow. Is the operation at that level a safe operation as described to you? A. No, I'd say it was not safe. Before going down there very deep, I would have done something, it seems like, to make it safe.

Q. What could you have done to make it safe? A. Working with the ship as you described it?

Q. As the ship came in. A. The only way to alleviate the probable disruption of that stow and collapsing of that bulkhead would be to break it down, step it down, by—you have about nine feet high—to go in perhaps two or three
78 tows—three rows, and come down about three or four tiers and take that all out of the square there and move it probably to another part of the ship up forward, if there was room for it.

Q. When would you have started that? A. I would have stepped that down as I came out with my steel, so I would be working on the same level all the time, which would be the most practical and easiest way to work rather than work down, and then you have to work at another level. It is better to work all on the same level.

Q. Suppose you were the officer in charge of the stowage of the cargo in LeHavre, France, the vessel came [371] into LeHavre with the steel loaded, the steel was already in the lower hold when it came to LeHavre. At LeHavre it took on other cargo and this particular stow of wire coils. Would you at that time have anticipated, knowing that the steel was coming out in New York and that the wire was to remain, at that time the possibility of the difficulty in removing the steel under those circumstances? A. I think I would, yes. The idea of lengths in one end and a bulkhead of general cargo in another I would say always leads to trouble. You should have ample clearance. At the beginning of the stowage of the wire, I would have left 80
more clearance. I think it would have been a much better proposition spreading the hatch instead—they only had an eight-foot clearance. They could have given it probably 12 feet, 15 feet if they had room—to allow for taking the steel out.

Q. There has been testimony, sir, that there was a void or empty space between the top of the cargo and the 'tween deck of approximately 26,000 cubic feet? Is that sufficient area to permit the stowage of wire reels to be moved forward? A. Yes, ample. Ample space. As I said before, if they only moved it forward, stripped off 56 feet wide of this and three feet this way and nine feet this way, [372] that would only run to a small fraction of 26,000 cubic feet, something like, three times nine, 30, 1200, 1500 cubic feet
out of 26,000. Seems like it would have been ample room. 81

Q. Sir, at the time of loading the wire, steel, anticipating possible difficulty in discharging that cargo, what other methods were there to prevent such difficulty? A. In the actual stowage of the cargo?

Q. Yes. A. This bulkhead of steel—of wire coils could have been—today it is common practice in many ships, not all ships, by any means, but using a means of preparing a quick, prefabricated bulkhead, or at least supporting con-

struction of additional boards laid vertically against a bulkhead of this type, then using a patented device called sigmoid steel strapping, with portable beam clamps that you can take the portable clamp beams athwartship, along the frames, and run this steel strapping—it comes in strips about 1½ or 2 inches wide and 5/100 of an inch thick, and using patented tools to set it up tight, stripped, well, you got about nine foot high, you could put three strips, maybe four, depending on your anticipation of strength needed, and you could have built a bulkhead, or it could have been [373] built to support, without having to shift any more cargo in the port of discharge doing this.

83 If sigmoid strapping is not available, then you would have to resort to wire, old wire falls with turnbuckles, or something of that nature. It would not be as handy.

Q. How could you do that, using old wire falls and turnbuckles? A. Well, it would be used the same way, on both sides of the ship, I would use portable beam clamps and use wire clips, and make an eye at each end, and bring the wire athwartships, and somewhere along the middle of the ship connect it with a turnbuckle, pelican hook, set it up tight, and that would bear up against the load and hold the dunnage up against the wire, which would keep it from falling aft.

Q. The sigmoid lashing that you have been referring to, how long is it that it has been used? A. It was used rather extensively during the war. In my experience before the
84 war, I never used it at all. During the war it was used to some extent. Since the war it has been used more and more. It is used rather extensively now.

Q. Of course, you would say it has been in use for [374] at least the last ten or twelve years? A. At least, yes. It has been used—it was a common thing to secure cargo in railways—railway cars—before the war. As I understand it, it was developed for marine use during the war. Got some impetus during the war.

Q. If you were the officer in charge of the discharge of this steel cargo and at that time they were about six or seven feet deep and you personally witnessed a longshoreman causing the steel cargo to come in contact with the steel coils, what if anything would you have done at that time? A. As chief officer, and if longshoremen were in the hatch? I would have gone to the ship's superintendent, stevedoring representative, generally, walking boss, depending on what terminology you use, and ask him to break down the bulkhead there, as I mentioned previously, it could have been done, that is, by moving, shifting this cargo forward.

Q. Why would you have done that? A. To provide—oh, protect the cargo and to give additional safety to the people working in the area, especially the longshoremen working below as they dug deeper.

[375] Q. Have you an opinion, sir, as to whether or not at the time these longshoremen were approximately six or seven feet below that stow, and discharging the steel under the circumstances as I have described it to you, have you an opinion, sir, as to whether or not it was safe for them to operate under such conditions? A. Yes, I have.

Q. What is your opinion, sir? A. I would say it wasn't safe.

The Court: I would take "operate" to cover everything conceivable that a longshoreman can do. Is that what you mean?

Mr. DiCostanzo: Yes, your Honor.

The Court: Your answer is that it is unsafe for them just to be there, is it?

The Witness: Not just to stand there, sir. Just to perform what they were doing, snaking these things out and working in that area, performing what they were doing, was unsafe.

The Court: I haven't heard anybody describe what they were doing. Did anybody? They said they were taking out the cargo, steel, but you don't know how they were taking it out, do you?

The Witness: Not precisely, no.

[376] The Court: Then I go back to my original question, do you mean it is dangerous for them just to be living down there?

The Witness: Just to be——

The Court: Just alive? If you don't know what they were doing——

The Witness: No, sir.

89 The Court: (Continuing) —that must be the sense of your answer.

The Witness: I was told they were discharging steel in lengths, 20 feet.

The Court: That is right.

The Witness: And I am assuming that they do it in the normal manner of using either chain or wire, and wrapping it around, round turn, putting it on the hook and snaking it out in this fashion, which is the only way I know how to discharge long lengths.

The Court: Is that the normal way?

The Witness: That is the normal way, yes, sir.

Q. There has been testimony that the longshoremen did precisely what you have stated, that is, that they attached
90 one end of the wire sling to the forward end of the steel and then they attached the wire sling to the after end of the steel, and that the draft of cargo was [377] then raised at an angle, that is, the forward and higher than the rear end. Under that operation, with a seven-foot bulkhead of wire, would you consider it safe? A. No, sir.

Cross-examination by Mr. Estabrook.

Q. Have you ever used sigmoid steel strapping yourself? A. Yes, yes.

Q. On ships? A. No.

Q. For demonstration? A.Yes.

Q. Have you personally participated in the development of the sigmoid steel strapping for maritime work? A. No, sir, I haven't. It came to my attention while I was in the billet I am now in, teaching billet.

Q. But you have never used it at sea? A. No, sir.

Q. But you would consider it proper, if you were snaking out 20 feet lengths of steel with two-foot clearance between one end of the steel and the wire bulkhead to move that wire further away so as to give you more space? That would be a normal precaution to take, wouldn't it? A. Yes, sir. 92

Q. And when you are snaking out steel in a confined space, from your experience, is it proper to use [378] backstops and guide lines? A. Guide lines, yes.

The Court: You just told me before that taking it out, one end—nobody mentioned anything about guide lines—you said that was a normal way to take it out. Are you amending your answer to indicate the use of guide lines would be normal?

The Witness: Yes, sir, I would say—I did not mean to admit the fact there were no guide lines. Guide lines are normal with heavy steel, reels, or construction steel of this type. I would say it is a normal thing to have guide lines on the draft. 93

The Court: If you had guide lines, why would you worry about what they call a bulkhead of wire coils?

The Witness: Well——

The Court: Wouldn't the guide line operate?

The Witness: As I conceive a guide line, it is not

a positive control of the load. Guide line, as I see it, is only to start a swing or stop it. You cannot expect, in my opinion, stevedores or longshoremen, rather, to hang onto the guide line while you are snaking all this out under all conditions. It is only, I would say, to snub or guide it out, precisely what the word says. You can't prevent it—if your fall starts to hoist up and it slides forward—you cannot prevent it from—you [379] cannot and it cannot be prevented from dragging each and every time. If all hands happen to have hold of the guide line and snake it out, or they had a round turn around something to tie it on, perhaps it could
95 be stopped, but that would be impractical, maybe impractical, because I feel it would be too slow. And it would require, the guide line, putting a strain on it because, when you get the fall going up and the guide line tightens up, something has to give, either the men slack off—and if you don't slack off precisely at the right time, your guide line would go. I believe the guide line is only to snake it around and make room, and so men don't have to go right up and touch the draft each and every time.

Guide lines are used in automobiles and so on, to move; they aren't ever in lengths, awkward, of this type.

Q. Guide lines are used for automobiles, though, aren't
96 they? A. Yes, sir.

Q. Automobiles weigh between one and a half and two tons, don't they? A. Yes, sir.

Q. So guide lines are proper for drafts weighing one and a half to two tons? A. Yes.

Q. You discussed temporary wooden bulkhead, but then you confined that to a portable, refabricated bulkhead, [380] didn't you, for general cargo? A. No, I said that

you might use the term prefabricated or improvised bulkhead, not an actual—not an actual bulkhead built with—for temporary support, just a bulkhead of dunnage stood on vertically with this sigmoid lashing across to hold it up against the stow of cargo, and then, as erected in that fashion, I would call it a temporary, improvised bulkhead.

Q. And that dunnage on end would be the 1 x 6 wood? A. Yes.

Q. Could that be soft wood, as well as hard wood? A. Yes, sir.

Q. And in your opinion, would a 1 x 6 board, lapped, withstand a ton and a half impact from a bundle of steel? A. Not if it was too hard. I don't think it would, no.

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Q. You spoke of dunnage to tie in the stow, I believe, didn't you? A. Yes, sir, I did.

Q. What is the tensile strength of wood when it is being pulled off? A. I don't know.

Q. It is not very strong, it is, compared to anything—compared to steel or rope? A. Not an equal cross-sectional area, no, but—[381] definitely not.

Q. I show you a book, "Modern Ship Stowage," U. S. Department of Commerce. Are you familiar with that? A. Yes, we use that as our reference.

Q. I call your attention to page 118, my edition, 1942, it is, I don't know whether it is a reprint or not, and point out the book states:

"Dunnage is used for the following purposes, which vary in accordance with the cargo that is being carried:

99

"(1) To prevent the movement of cargo and chafage, by chocking off and securing containers and by filling in broken stowage or spaces which cannot be filled by cargo."

Are you in accord with that? A. Yes, sir.

Q. That means, definitely, you can use dunnage to wedge between things so— A. Fill in voids, is what they are speaking of there, too.

Q. "(2) To protect cargo from contact with water"—
A. Drainage, that is right.

Q. "(3) To protect cargo from contact with moisture or sweat"— A. Right.

Q. "(4) To protect cargo from contact with [382] condensed moisture, which is collected and retained on side stringers"— A. That is a repeat of the same thing. Three and four is the same thing.

Q. "(5) To provide air courses for heated, moisture-laden air to travel to the sides and bulkheads— A. Right.

Q. This book says nothing about using dunnage to tie in the stow, does it? A. My book does.

101 Q. But this book doesn't? A. Doesn't, no, sir.

Q. This book is used by your school, isn't it? A. Yes, sir, it is.

Q. Do you agree with this book? A. Not entirely. That is why I wrote my book.

Mr. Estabrook: No further questions.

Redirect examination by Mr. DiCostanzo.

Q. Is dunnage limited to the uses specified in the book? A. Spreading of weights is the one thing I believe they have omitted there, spreading of weights by using dunnage commonly between tiers of cargo.

Might I go ahead and speak slightly on this point?

102 Q. Yes. A. When stowing cardboard cartons of merchandise in the form of bottled goods in the lower [383] holds, deep lower holds, you spread the weights out by using dunnage floors, solid dunnage floors about every third tier. This provides—this binds the stow together besides spreading the weights. Let me show you what I mean. If a carton breaks, down at the bottom of the stow, if you didn't have this dunnage, the superimposed cartons will come down into the hole that is left by the broken container.

If you have the dunnage, you can take one carton completely out, and you would only have units, because the dunnage bridges over—the dunnage is a bridge from one container to the other, and on faces of bulkheads of cargo, it acts the same way, it ties together, as I said before, the carton merchandise or any merchandise in which it is used, and if you are building a bulkhead, you cannot use—sometimes a cargo can be used to tie itself together, in the case of bag goods, cross-tiering on the face, then you don't need dunnage, dunnage would be injurious to the cargo, but if you didn't have something of this nature, why, dunnage can be used for that purpose.

Q. Isn't dunnage also used to even off a stow? A. To 104
strike a level, yes, sir, strike a level, which means to prepare solid level base so on your next cargo that goes in, it spread its weight equally and [384] doesn't superimpose hard upon some particular point on a container underneath the cargo that is being stowed now.

Q. Would you say, sir, that the use of guide lines would have prevented the striking of the steel against the wire? A. In this case we are talking about?

Q. Yes. A. If guide lines would have prevented the striking? If it was used as they are normally used, I would say I don't think it would. What I mean by "normal," it could be used, as I said, take the guide lines back aft and snub it around, take a round turn around something and then tighten up the guide line and as they haul it up, perhaps keep it clear, but each time you do maybe the guide line 105
would carry away. I would say you would be imposing perhaps another danger on people working in the hatch. Guide lines are not for that purpose, as I see it. They are to help out but not to completely snub down the movement of cargo.

Q. An automobile, although it weighs a couple of tons, it occupies a greater cubic foot area than a 1-ton or 2-ton bundle of steel, doesn't it? A. What was that?

Q. An automobile weighing about 2 ton takes up a larger area than a bundle of steel weighing 2 tons, doesn't [385] it? A. Yes.

Q. And it is much more easy to control, isn't it? A. I don't see what your question is. Moving this automobile you made reference to before with the guide lines, when you get the automobile in the square of the hatch, maneuvered there not by guide lines but by being pushed or otherwise brought out into the square, it is hoisted up. It may not be directly fore and aft or thwartship, whatever they want to take it up. So they use the guide line to twist it. One man can take a guide line and move the car. Of course,
107 as it goes up they don't want the car to twist and strike the coaming. So the guide lines are passed up to men in the hatch and they keep it straightened up as she rises out of the hatch.

If there is no likelihood of a twist, they let the guide lines go as soon as it's clear; but either the steel or automobile I would say could be equally handled equally easy, just twisting it around so it will go up and won't come around and strike the coaming.

Q. Have you an opinion as to whether or not at the inception of the work the proximity of the wire coils to the steel presented a safe situation? A. Would you repeat that question?

[386] Q. Can you tell us whether or not at the inception of the discharging of the vessel, at the time when the steel
108 was practically on a level with the tunnel and the wire was two or three above that level with this one-foot space, one to two foot space in between, would you say at that time it was a safe operation in the discharging of the steel? A. At the very beginning?

Q. Yes. A. Yes, I would say just the first two or three tiers coming out would be considered safe.

Mr. DiCostanzo: That is all.

Recross-examination by Mr. Estabrook.

Q. To go back to the question of leaving a larger space between the wire and steel at the port of loading, have you sailed North Atlantic? A. No, sir; North Pacific.

Q. But North Atlantic in March is rough, isn't it? A. Yes, sir.

Q. And when you go North Atlantic in March, isn't it true that the ship's officers must take into account the stability of the vessel? A. Yes, sir.

Q. And don't they have to plan the stowage of a [387] heavy commodity like steel so as to take that into account, they can't put too much in the 'tween deck or too much too high? A. Definitely, yes, sir. 110

Q. Isn't it also true, Commander, when you are stowing a cargo like steel you must spread it out evenly about the vessel? A. Yes.

Q. You can't leave a hole? A. No void, that's right.

Q. You must minimize any space as much as possible? A. As much as possible, especially athwartship.

Mr. Estabrook: No further questions.

The Court: How much do you think the coils we have been discussing weighed?

The Witness: The coils of wire are about 150 pounds, as far as I know. About the size of a tire.

The Court: That is standard, is it?

The Witness: I don't know if you would say there 111 is any standard. I have seen them large and seen them small.

The Court: Why do you fix on the size of tire and how do you know the weight?

The Witness: Just being told that they were this weight. Mr. DiCostanzo told me the weight.

112 *Charles L. Sauerbier—For Libelant in Rebuttal—Redirect.*

[388] The Court: Do you remember any questions as to the weight? I don't remember the dimensions.

Mr. DiCostanzo: I don't remember the weight either.

The Court: You mean before you took the stand?

The Witness: Yes, sir.

The Court: And the size also?

The Witness: Yes, sir.

The Court: All right.

Redirect examination by Mr. DiCostanzo.

113 Q. In stowing the cargo of steel, with the full knowledge that it was coming out at New York and knowing that you were to pick up a cargo of wire which was to go to Baltimore, would you have stowed the steel in the center of the hatch— A. No, sir.

Q. —and the wire whereat the steel was? A. No, sir.

Mr. DiCostanzo: That is all, Commander.

Mr. Estabrook: No further questions.

(Witness excused.)

* * * * * *

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 427

A/S J. LUDWIG MOWINCKELS REDERI,

Petitioner,

—against—

MANUAL AMADOR,

Respondent-Libelant,

—and against—

COMMERCIAL STEVEDORING CO., INC.,

Respondent-Respondent Impleaded.

RESPONDENT-LIBELANT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT WITH APPENDIX

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ROBERT KLONSKY
On the Brief

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POINT I

The petition herein fails to establish any real conflict on the same matter of law or fact, and is without any special and important reason to equate the instant case with that of McAllister v. United States, supra 9

POINT II

The issue of indemnification implied in law as regards passive and active negligence, raised in the petition as an attempt to equate this case with that of Ryan Stevedoring Co. Inc. v. Pan Atlantic Steamship Corporation, pending reargument before this Court (No. 4 October 1955 Term), is without basis for in fact there are express provisions of indemnity in a written contract between the shipowner and stevedore herein, not yet resolved 13

APPENDIX 1a

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COMMERCIAL STEVEDORING CO., INC.,

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The Findings of Fact and Conclusions of Law by the United States District Court, Southern District of New York are not officially reported, unofficially reported at 1954 American Maritime Cases 958, and reprinted in petitioner's appendix. The unanimous opinion of reversal and remand for the determination of damages by the Court of Appeals for the Second Circuit is reported at 224 F. (2d) 437 and reprinted in petitioner's appendix.

Jurisdiction

Jurisdiction is invoked by petitioner under and by virtue of 28 U. S. C. sections 1254 (1) and 2101 (c), as well as Rule 19 (b) of the rules of this Court, and specifically on the ground of conflict between the decision below and those of this Court and other Courts of Appeals.

Statement

The subject matter involved is nothing more nor less than a "garden variety" action by a longshoreman for injuries sustained in the course of his employment aboard a merchant vessel, by reason of unseaworthy conditions constituting an unsafe place wherein to work, which conditions preceded the start of work by respondent and his fellow-employees and were clearly within the control and responsibility of the petitioner herein.

The petitioner misconceives the proper basis on which this Honorable Court grants certiorari, and argues that certiorari should be granted to review a decision of a federal court of appeals merely because it is in direct conflict with a decision rendered by a district court in the same circuit. Though it is argued that the unanimous opinion of the Court of Appeals for the Second Circuit herein is at variance with the opinion of this Court in *McAllister* v. *United States,* 348 U. S. 19, 75 S. Ct. 6, it is clearly apparent that there is no real conflict on the same matter of law or fact, and that there is not raised herein any question of wide import under the Constitution, laws, and treaties of the United States as would prompt certiorari.

The circuit court below refused to engage in the extreme speculation and erroneous inferences of the district court on the clearly established basic facts involved herein. With the elimination of one erroneous statement referred to hereinafter, and again erroneously asserted in the brief of

petitioner, the first five findings were accepted as "not clearly erroneous" (p. 7a of petitioner's appendix). What was clearly erroneous was the error of the district court in concluding that a dangerous stowage of a cargo of wire coils, constituting an ever increasing obstruction to the safe discharge of a cargo of steel strips that had to be angled and raised over the higher stow meant for a later discharge at another port, played no part in the proximate cause of an accident where a draft of steel strips struck the wire coil mass, causing part to fall upon the person of respondent who was then engaged in work not concerned with the events that rendered him permanently and totally disabled. The circuit court was compelled to find from the basic facts set forth by the court of first instance that the so-called "gross negligence" of the stevedore in causing repeated collisions between the slings of steel strips and the obstructing wire coil mass, a danger known to the petitioner's officer on duty, was not the sole proximate cause, and perforce, on the principle of concurrent fault, correctly held for the injured longshoreman.

There is no need to burden this Court with a lengthy recitation of all the facts, fully considered by the circuit court below to prompt its unanimous opinion that the conclusions drawn by the district court from the facts showing a patently unseaworthy hold proximately related to the injuries herein were "clearly erroneous." Petitioner's brief admits at the very start of its "Statement of the Case" that the shipment of steel strips consigned to the first port of discharge were stowed in the aft end of the hold, whereas the shipment of wire coils consigned to a later port of discharge was stowed in the same hold under the square of the hatch. As found by the district court, and accepted by the circuit court, the stow of wire coils in the square of the hatch was two or three feet higher than the stow of steel strips (p. 1a of petitioner's appendix).

From this uncontradicted relationship of the two stows, the circuit court properly reached the only reasonable conclusion, as follows:

> "In the case at bar, considering the position of the strips and the port to which they were consigned, they were properly stowed, only in case the coils were moved out from under the square of the hatch before the strips were themselves discharged; or, if that was impracticable, if the coils were actually discharged at New York, and then reladed after the strips had been discharged" (p. 10a of petitioner's appendix).

The circuit court opinion continues by stating that the "stowage was improper," made increasingly dangerous by the obvious physical fact that as the stow of steel strips became lower during discharge, the obstacle of the coil stow in the center of the hatch over which the discharge had to be effected became higher and increasingly dangerous. Knowledge of the danger and the actual collision of the slings of steel colliding with the obstructing coil stow was admitted by the petitioner's second mate in charge.

A careful reading of the findings of fact by the district court shows that in three places emphasis is placed on the authorization purportedly given by this second mate to the longshoremen to remove the danger of the top-heavy and misplaced wire coil cargo (pp. 3a, 4a, 5a of petitioner's appendix). In fact, no such necessary authorization was given. This is the "erroneous statement" referred to in the opinion of the circuit court herein (p. 7a of petitioner's appendix).

This oft repeated basis of the stevedore's fault for failing to remove the dangerous obstruction pursuant to authority of the second mate is completely contradicted by the testimony of the second mate, who admitted his responsibility as to safe discharge, as follows:

"Q. What was that responsibility? A. Well, I was in charge of the ship. I have to look out for the cargo come out good" (p. 1a of respondent's appendix to brief).

* * * * *

"Q. Did you tell the longshoremen to stop and remove some of the wire coils? A. No, I did not, I told them to be careful" (p. 1a of respondent's appendix).

This major and reversible error in the findings of fact as to unheeded authorizations to remove the dangerously placed wire coils, is further compounded by the mistake of fact in the following portion of the district court's finding below:

"The assistant operating manager of the ship's agent who also was general superintendent of Commercial Stevedoring Company authorized the boss of the stevedoring gangs working in the No. 4 hold to remove so much of the coil cargo as would at any time appear to facilitate the discharge" (pp. 2a, 3a of petitioner's appendix).

The so-called general superintendent of Commercial Stevedoring at the time of trial was Carl Bentsen, who testified as follows with reference to his position and authority at the time of the accident involved herein:

"Q. What was your job for Commercial at that time? A. There was no title attached to it" (p. 2a of respondent's appendix).

From this it is clear that at no time did a responsible official give the necessary authorization to remove the patently dangerous condition.

Even had the circuit court accepted the pivotal erroneous finding of the district court that the necessary authoriza-

tion to remove the offending wire coil stow had been given, the conclusion of liability is still inescapable by reason of the very existence of the dangerous stowage which necessitated an authorization never given. The basis of the findings of fact by the district court is that the stevedore failed to remove dangers in the hold that had been created before the longshoremen came to work. It failed to hold that though this might constitute active or primary fault, nonetheless the shipowner is liable at the very least for passive or secondary fault on its non-delegable obligation to furnish respondent with a safe place to work.

Though the issue of control and responsibility is now radically different than it had been prior to the decisions of this Honorable Court in *Petterson* v. *Alaska Steamship Co.*, 205 F. (2d) 478, aff'd 74 S. Ct. 601, 347 U. S. 396 and *Rogers* v. *United States Lines,* 205 F. (2d) 57, rev'd 347 U. S. 984, so that now the duty of seaworthiness owed by a shipowner goes beyond and continues during the time the stevedore works in a hold, nonetheless under the facts herein it is clear that liability would have followed even under the old law as expressed in *Grasso* v. *Lorentzen,* 149 F. (2d) 127, 129, cert. den. 326 U. S. 743.

As concisely stated by Chase, *C.J.* in *Anderson et al.* v. *Lorentzen, et al.*, 160 F. (2d) 173, 175, "Cargo which was unsafe to work upon made the place of work unsafe." See *Palazzolo* v. *Pan-Atlantic S.S. Corp.*, 211 F. (2d) 277, affirmed by this Court on April 11, 1955 and again before this Court for determination of the question of implied indemnity, now captioned as *Ryan Stevedoring Co., Inc.* v. *Pan Atlantic Steamship Corporation* (No. 4, October 1955 Term), where a longshoreman was redressed for injuries that had resulted from an unseaworthy stow previously loaded by his own employer at another port.

In the instant case the district court emphasized the absence of stays or guide lines for the safe maneuvering of the unwieldy drafts. This rendered the slings used, longshore equipment, unfit for their purpose in the meaning of the lower court's findings. Accordingly, unseaworthiness is inherent in these defects and liability, being non-delegable, must fall on the shipowner.

See: *Mahnich* v. *Southern S.S. Co.*, 64 S. Ct. 455, 321 U. S. 96; *Ondato* v. *Standard Oil Co.*, 210 F. (2d) 233.

It cannot be stated that the stevedore's knowledge of the unsafe conditions, particularly as to the absence of these lines, and the extreme difficulty of overcoming the obstacle of the coil wire mass, can be imputed to the respondent.

The precise question of whether liability can be predicated on a dangerous condition known to the injured person who could have avoided the risk, came before this Court in *Beadle* v. *Spencer*, 298 U. S. 124, opinion by Mr. Justice Stone, which held that though the plaintiff could have left the vessel as he was not bound by ship's articles, nonetheless there was no reason to relax the applicable admiralty rule that assumption of risk is not a defense to a suit claiming unseaworthiness.

Assuming, however, that the district court is correct in finding that "dislodgement of the coils was caused by successive collisions between the ends of the drafts of steel strips as the drafts were lifted * * *" (p. 3a of petitioner's appendix), and that "There is no credible evidence in the case that the coils were ever disturbed other than by the collisions with the drafts of steel as the stevedores worked" (p. 4a of petitioner's appendix), then how can it be correct in finding that the vessel was at all times seaworthy in respect to its stow in No. 4 hold?

The repeated collisions, over a considerable period of time, with knowledge in the petitioner by its officer in charge, were either caused by or did cause an unseaworthy condition while petitioner had control and admitted responsibility. Its failure to exercise this responsibility by accepting an added cost in the authorization of removing the offending wire coils, or to provide proper lines and equipment to add a measure of safety under the circumstances involved, prompt liability on both counts, negligence and unseaworthiness.

It cannot be denied, nor does the district court's findings or petitioner's brief assail the fundamental proposition of the fact that respondent worked under dangerous conditions. That the steel strips had to be "angled" out over the wire coil from its position in the aft end of the hold, that there had been prior repeated blows to the wire coil mass from the slings of steel during cargo discharge, that there was an absence of any guide lines or back stops on the slings, and that the masses of cargo had been stowed overseas according to a cargo plan drawn by the first officer, so that the steel had to be brought out from under the wing, were all known to the ship's officer in charge, Reinhart Lunde.

It does therefore inexorably follow that the admitted initial dangers in a hold over which the petitioner never relinquished control, as to which the petitioner by its second officer never gave authorization to remove, aggravated by the failure to supply the guide ropes which would have made the slings seaworthy, must prompt liability on petitioner.

POINT I

The petition herein fails to establish any real conflict on the same matter of law or fact, and is without any special and important reason to equate the instant case with that of *McAllister* v. *United States, supra.*

The petition errs by presenting in a question for review that the circuit court decision herein failed to hold that the findings of the district court were "clearly erroneous." In fact, said circuit court decision set forth the first five findings, "eliminating one erroneous statement," as "not clearly erroneous" (p. 7a of petitioner's appendix), and then went on to find the only reasonable conclusion on the uncontradicted physical facts without indulging in inferences or speculation.

Unlike the *McAllister* case where there was a balance of probabilities to allow for a reasonable inference by the district court, resolved from a conflict of medical experts as to polio contamination, there was no such balance here. In fact, the very expert on whom petitioner strongly relies to show a conflict, Alf S. Lie, marine consultant, testified significantly as follows:

> "By applying themselves, through holding back this load, and heaving it up very gradually, taking a strain on the higher end of it and let it slide forward, it could easily do without backstops in such operation, but they would have to hold it back somehow" (p. 2a of respondent's appendix).

It has been held that if an unseaworthy condition plays a role, even a minor one, in an accident where the active and primary fault is that of the stevedore, nonetheless the shipowner must fully redress the injured longshoreman and may thereafter seek indemnification from the steve-

dore-employer. In an action for indemnification, Denman, Chief Judge, held as follows in *United States* v. *Arrow Stevedoring Co.,* 175 F. (2) 329, 330 (9th C. C. A., June 1949):

> "The Government admits liability to the stevedore because it had a continuing duty to him to see that at all times he had a safe place to work, and is so liable to him for a failure to keep the vessel seaworthy in that regard. Such liability exists even though the sole proximate cause of such unseaworthiness and the injury to Williams was not the defect in the hatch cover but, as the Government claims, its conscious use with knowledge of its defect, by the stevedore's superintendent in a way making it dangerous and causing the injury to Williams."

From an address by the late Chief Justice Vinson before the American Bar Association, September 7, 1949, the following are his pertinent observations on when this Honorable Court grants a review on writ of certiorari as a matter of sound judicial discretion, not a matter of right, expressed in Supreme Court Rule 38 (5) as based on "special and important reasons therefor":

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Judgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on

federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our prima facie impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved." (*Supreme Court Practice,* Stern and Gressman, The Bureau of National Affairs, Inc., 1950, p. 98.)

Unlike the instant case, the importance of the *McAllister* case, *supra,* is gleaned from its decisional background. McAllister had first obtained a jury verdict in his suit against a general agent, which was unanimously affirmed by the Court of Appeals for the Second Circuit in 169 F. (2d) 4. This Court had then granted the general agent's petition for a writ of certiorari on November 22, 1948, and reversed on the ground that the general agent did not have such control as to be liable for negligence of the Master or unseaworthiness of the vessel. In 337 U. S. 783, this Court did not question the findings of fault established by the two lower courts as regards the liability of the vessel and its Master. Thereafter, by an Act of Congress on December 13, 1950, prompted by this very decision, McAllister was allowed to bring an action in the admiralty against the United States of America as the owner of the vessel despite the already elapsed two years statute of limitations ordinarily invoked in such suits. In the admiralty McAllister was granted a decree against the United States of America.

On appeal, the Court of Appeals for the Second Circuit reversed in 207 F. (2d) 952, on substantially the same record it had previously affirmed the jury verdict.

It is apparent that on the special reason of the decisional background of the *McAllister* case this Honorable Court fairly granted certiorari. Even then, this Court held that the circuit court did not depart from the standard expressed as follows:

> "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed'" (p. 8 of 75 S. Ct.).

The dissent of Mr. Justice Frankfurter in the *McAllister* case, *supra,* is singularly applicable here, where he wrote as follows:

> "The present case is one of those instances when a full appreciation before the writ was granted of what the argument developed should have led to a denial of the writ" (p. 10 of 75 S. Ct.).

POINT II

The issue of indemnification implied in law as regards passive and active negligence, raised in the petition as an attempt to equate this case with that of *Ryan Stevedoring Co. Inc.* v. *Pan Atlantic Steamship Corporation*, pending reargument before this Court (No. 4 October 1955 Term), is without basis for in fact there are express provisions of indemnity in a written contract between the shipowner and stevedore herein, not yet resolved.

The opinion of the circuit court below concludes with a discussion of the written indemnity contract which was the basis of the cross-claim of respondent against respondent-impleaded, now remanded for trial. Petitioner concedes in its brief that "The indemnity features are, therefore, not before this Court on this petition" (p. 5 of petitioner's brief). It follows therefore that there is no basis to petitioner's argument to the effect that, as in the *Ryan Stevedoring* case, *supra,* an inequitable result would follow from affirmance by reason of holding a shipowner for "liability without fault or slight fault." Here is an unresolved written contract of indemnification that probably would place the onus on the party responsible for the accident involved herein. Petitioner cannot complain of an injury it may never suffer. Respondent, however, who played no role in the tragedy that befell him, asserted his sole remedy in admiralty which has been resolved from the uncontradicted physical facts in his favor.

The circuit court recognized the clearly erroneous findings of the district court concerning necessary authorization given by the responsible ship's official to remove the offending wire coil stow as the pivot to the clearly erro-

neous conclusions of the district court favoring the shipowner herein. In the light of the law expressed and reaffirmed by this Court in *Sieracki* v. *Seas Shipping Co.*, 328 U. S. 85, *Hawn* v. *Pope & Talbot, et ano.*, 346 U. S. 406, as well as the *Petterson* and *Rogers* cases, *supra,* the uncontradicted facts applied in proper focus by the circuit court below were resolved fairly and unequivocally in favor of respondent.

On the basic facts as to the relationship of the stows of steel strips and wire coils the courts below are in accord. The petition therefor seeks review in a negligence case where only the interpretation of facts bearing on the issue of causation or negligence is involved. Respectfully, this is not the proper subject for review by this Honorable Court.

WHEREFORE, it is respectfully urged that the petition herein be denied.

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ROBERT KLONSKY
On the Brief

APPENDIX TO BRIEF IN OPPOSITION TO PETITION

Excerpts from Testimony of the District Court

(p. 314) REINHART LUNDE, recalled.

Direct Examination by Mr. Estabrook:

Q. Mr. Lunde, your oath that you gave before is still binding on you. Are you a licensed officer in the Norwegian Merchant Marine? A. Yes, sir.

• • • • •

Q. On March 21, 1951, what were your duties as second mate on the Rondo? A. I was in charge of the ship that day because the chief officer was ashore.

• • • • •

(p. 315) Q. Did you have any responsibility as to certain holds? A. Well, I had.

Q. What was that responsibility? A. Well, I was in charge of the ship. I have to look out for the cargo come out good.

• • • • •

(p. 340) *Cross Examination*:

Q. Did you tell the longshoremen to stop and remove some of the wire coils? A. No, I did not. I told them to be careful.

• • • • •

(p. 253) CARL BENTSEN, called as a witness on behalf of the Respondents, being first duly sworn, testified as follows:

Direct Examination by Mr. Estabrook:

Q. Captain Bentsen, by whom are you now employed? A. Cosmopolitan Shipping Company, Inc. and Commercial Stevedoring, Inc.

Q. What is your title with Cosmopolitan? A. Assistant Operating Manager.

Q. And what is your title with Commercial Stevedoring? A. General Superintendent.

Q. And by whom were you employed in 1951? A. I was employed by Cosmopolitan Shipping Company, and also by Commercial Stevedoring, but not as General Superintendent for Commercial at that time.

Q. What was your job for Commercial at that time? A. There was no title attached to it.

* * * * *

(p. 351) ALF S. LIE, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

Direct Examination by Mr. Estabrook:

Q. Captain Lie, what is your present occupation? A. Marine consultant.

* * * * *

(p. 356) Q. Eight men below, four men on each side of the tunnel. A. By applying themselves, through holding back this load, and heaving it up very gradually, taking a strain on the higher end of it and let it slide forward, it could easily do without backstops in such operation, but they would have to hold it back somehow.

FILED
OCT 19 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 427

A/S J. LUDWIG MOWINCKELS REDERI,
Petitioner,

against

MANUAL AMADOR,
Respondent-Libelant,

and against

COMMERCIAL STEVEDORING CO., INC.,
Respondent-Respondent Impleaded.

PETITIONER'S BRIEF IN REPLY

JAMES M. ESTABROOK,
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FRANCIS X. BYRN,
On the Reply Brief.

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PETITIONER'S BRIEF IN REPLY

Statement

In the interest of pin-pointing the issues which have been scrambled by respondent Amador's brief in opposition, petitioner finds it necessary to file a reply brief. In general on this petition, respondent Amador seeks to reargue the facts not only by expressing disagreement with the findings of the District Court, but also dissatisfaction with the limited grounds upon which the Court of Appeals based liability, possibly appreciative of how untenable those grounds are.

The basic questions here, however, are

(1) Whether petitioner has been deprived of its right to have the facts determined by the trial judge, who saw and heard the witnesses, in accordance with this Court's opinion in *McAllister* v. *United States,* 348 U. S. 19, and

(2) Whether the shipowner may be held for the sole and gross negligence of the stevedore.

Unless the vessel were unseaworthy, unless the petitioner were negligent, there can be no liability of petitioner. The petitioner therefore wishes to make four brief points.

POINT I

The vessel could not have been unseaworthy.

The District Court found the vessel in all respects seaworthy in its cargo stowage. The Court of Appeals' only criticism of the stow was founded on the juxtaposition of the New York steel and the Baltimore wire. The Court of Appeals held this to be only conditionally seaworthy and conditioned upon the removal or the shifting of the Baltimore wire in order to accomplish the safe discharge of the New York steel. As shown in the petition, the Court of Appeals' opinion is not compatible with the finding of the District Judge explaining how the steel could safely be taken out of the hold by the use of stays or guide lines in accordance with the expert testimony of Captain Lie.

Only if the drafts of steel would necessarily come into collision with the wire reels, only if there were no safe and suitable method of discharge, can there be any justification for the conclusion of the Court of Appeals that shifting the wire reels was compulsory to seaworthiness. If the steel could be discharged in New York with only ordinary difficulty, as the District Judge found, it is impossible to say that the relationship of one cargo to another in the hold of the vessel could make the vessel unseaworthy.

The vessel would be no more unseaworthy under these circumstances than if stays or guide lines were necessary to prevent the swinging two ton drafts of steel from colliding with a part of the ship's structure and that part collapsed as a result of the stevedore's failure to use stays or guide lines.

Respondent Amador, agreeing that there was a reversal on the facts, tries to make the point that because of the frequent collisions between the steel and the wire, the cargo of ~~steel~~ reels became unseaworthy and was so for a considerable period. The Court of Appeals did not, however, base its decision on the condition of the stow of wire reels following their being struck by the steel drafts, but rather on the position of the wire reels with respect to the stowage of the steel drafts. In any event, the District Court held (Finding No. 5, page 3A, Petitioner's Appendix) that the immediate cause of the accident was the collision between the particular draft of steel prior to the one respondent Amador was engaged in preparing. The Court of Appeals accepted this finding.

POINT II

The findings of the District Court and the evidence upon which they are based show clearly that petitioner was not in control of the stevedores' work nor was the petitioner negligent.

Since the vessel was not unseaworthy in its cargo stowage, we proceed now to respondent Amador's claim asserted in his brief

(a.) that despite contrary findings by the Trial Judge, the petitioner by its Second Officer was in control of the work at the hatch where respondent Amador was injured and, further,

(b.) that petitioner, through its Second Officer, was negligent.

(a) Control

The language in finding No. 7 of the District Judge is pertinent as to control.

> "The superintendence and direction of the stevedores' work was entirely that of respondent stevedoring company which employed the men, including libelant."

The Court of Appeals made no finding that this was clearly erroneous and the testimony supporting it is substantial as will be shown.

If any control were exercised by petitioner, it could only be exercised through Second Officer Lunde. The testimony accounted for the whereabouts of the following people:

(1.) The Master of the Ronda had gone ashore during the morning on ship's business (p. 315, Record);

(2.) The Chief Officer was visiting the dentist on the day of the accident (p. 197, Record);

(3.) The Third Officer's work confined him to the foredeck that is, hatches 1, 2 and 3 of the vessel (pp. 198, 315, Record);

(4.) Captain Bentson, the representative of the ship's agent, testified he left the vessel and the pier before the accident (p. 257, Record).

As to Second Officer Lunde, he testified (p. 327, Record) that he was in command of the entire ship on the day of the accident and that meant all five hatches in addition to his other duties. He said that he first spoke to the hatch boss (p. 322, Record) about the collision at 8:30 in the morning and that after he admonished the latter, he went around the ship and when he came back he saw the collision happen again and again told the hatch boss to be careful. The accident, however, did not happen until later

in the day. When the accident did happen, Second Officer Lunde testified (p. 323, Record) that he was on the foredeck (The foredeck being separated from the afterdeck by the ship's superstructure and therefore out of view). When he went aft, the injured man had already been removed from the vessel. Lunde was asked on cross-examination (p. 339, Record) the total time spent throughout the whole day of the accident in hatch No. 4. His answer was, "Fifteen, twenty minutes."

The brief in opposition by respondent Amador tries by a half-page extract from the testimony of the Second Officer and by its general tenor to have this Court believe that the Second Officer spent all his time supervising and directing the discharge of steel from No. 4 lower hold of the m/s Ronda on the day of the accident. His testimony speaks for itself. It was uncontradicted.

Second Officer Lunde's responsibilities were to the vessel as a whole. He was in no position to supervise the discharge at any particular hold and did not in fact do so. Therefore, the finding of the District Court that the supervision and direction of the work at No. 4 hold was entirely that of the stevedores cannot be said to be clearly erroneous. Moreover, it was not held by the Court of Appeals to be clearly erroneous.

(b) Negligence

The District Court did not find Second Officer Lunde negligent in any degree. The Court of Appeals did not find any fault with Lunde's conduct except in one particular and that was his failure to see to it that the cargo of wire reels was shifted or removed so that the steel might be safely discharged. As shown in Point I herein and in the petition, this was not necessary, for according to the expert testimony, the cargo could have been discharged by the use of stays or guide lines. As shown in the petition (p. 12), stays or guide lines were stevedores' property and

under the control of the stevedore foreman. For the same reason that the vessel could not be unseaworthy, the Second Officer could not be negligent for failure to shift the wire reels.

The opinion of the Court of Appeals (p. 10a, Petitioner's Appendix) states that Second Officer Lunde twice saw the drafts hitting the coils and twice cautioned the hatch boss to be careful. Lunde testified he twice received the hatch boss' acknowledgment that he would be careful (p. 322, Record). When Lunde told the stevedores to be careful, he was telling them in his own non-legal way to conduct themselves as prudent stevedores. This, of course, was their responsibility in any event. Prudent stevedores, according to Captain Lie's expert testimony and the findings of the District Judge, would have used guide lines or stays. Second Officer Lunde could not have been negligent himself for failure to anticipate that the stevedores would not only be imprudent and ignore his admonitions, but would be so reckless in their conduct so as to prompt the Trial Judge to say (Finding No. 7):

> "So gross was their negligence that not even the repeated collisions served as warnings to take measures to avoid dislodging the stow of coils."

Second Officer Lunde left the hatch early in the morning and did not return until after the accident. He could not have been in control of the work and he could not have been negligent.

POINT III

The decision of the Court of Appeals makes the shipowner liable for the sole negligence of the stevedore and hence is in conflict with established law.

While the Court of Appeals pays lip service to the proposition that the shipowner will not be responsible if "the longshoreman were merely negligent in discharging

a well stowed cargo", its decision is quite the opposite. The District Court held that the stevedore's failure to use stays or guide lines was gross negligence. The Court of Appeals quoted this language without approval or disapproval. Unless this negligence be imputed to the shipowner, there can be no liability. If it is imputed to the shipowner, then the decision of the Court of Appeals is in conflict with the decisions of other Circuits as cited in the petition (Point 4).

While the issue here may in a sense be narrow in that a particular shipowner has been denied its proper review and has been made responsible for another's sole and gross negligence, it is also broad in that this action will now be cited for the proposition that, although the stevedore be grossly negligent, although the immediate and proximate cause of the accident be a failure to use equipment which the stevedore has contracted to provide and which is in their control, and although the superintendence and direction of the work is under the exclusive control of the stevedore, still the shipowner must be fully responsible for accidents arising under these circumstances because it did not anticipate or take precautions against the stevedore's negligence.

POINT IV

The only opportunity for review by this Court is now.

In Point II of respondent Amador's brief it is said that petitioner cannot complain of an injury it may never suffer because it may have indemnity. Overlooked is the fact that the issue of petitioner's liability to respondent Amador has now been foreclosed. Even respondent Amador does not wish to await the outcome of another trial on the indemnity issue, another appeal and finally an appeal to this Court by way of a petition for a writ of certiorari. If petitioner is not liable to respondent, it can be determined

now without awaiting further activity in the District Court, the Court of Appeals and finally in this Court.

There is ample reason for this Court exercising its discretion in favor of petitioner. If this Court is of the opinion that the Court of Appeals for the Second Circuit has not profited by this Court's reversal in *McAllister* v. *United States,* 348 U. S. 19, then the petition should be granted. Whether or not a Court of Appeals properly performs its reviewing function is certainly a matter for this Court's supervision.

This Court need not dwell extensively on this petition. The opinion of the Court of Appeals is "clearly erroneous" enough to warrant summary reversal.

Respectfully submitted,

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FRANCIS X. BYRN,
On the Reply Brief.